NO. 20360

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GLADYS TOWLES ROOT and GEORGE A. FORDE,

Appellees.

Appeal from the United States District Court
for the Southern District of California
Central Division

BRIEF OF APPELLEE GLADYS TOWLES ROOT

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

STATUTES

RULES

TEXTS

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Comes now Gladys Towles Root, the appellee, and in answer to the government's appeal sets forth as follows.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The following constitutional provisions, statutes and rules involved are set forth in Appendix A hereof: Sixth Amendment to the United States Constitution; Title 18, Section 1503, U.S. Codes; Title 18, Section 1621, U.S. Codes; Title 18, Section 1622, U.S. Codes; Title 18, Section

3731, U.S. Codes; Rule 7(c), Federal Rules of Criminal Procedure.

OPINION BELOW

The opinion of Judge Peirson M. Hall is set forth in Appendix B hereof.

QUESTIONS PRESENTED

1. Whether an appeal in this case lies exclusively to the Supreme Court of the United States and whether, in view of this fact, the Circuit Court of Appeals lacks jurisdiction in the light of the provisions of Title 18, Section 3731, U.S. Codes.

2. Whether a construction of Rule 7(c), Federal Rules of Criminal Procedure, is a statute within the meaning of Title 18, Section 3731, U.S. Codes, requiring the matter to be appealed directly to the Supreme Court of the United States and whether Rules of Court are construed such statutes in the light of U.S. v. Hvass, 355 US 570, 2 L.ed. 2d 496.

3. Whether a dismissal of a similar indictment in the U.S. District Court, which is not appealed, is res judicata as to a second and superseding indictment.

4. Whether an indictment which is 148 pages in length and weighs several pounds complies with the constitutional provision to inform an accused, the court and the jury of the nature and cause of an accusation or is so

prolix, ambiguous and confusing as to be an unconstitutional construction of the constitutional requirement of the Sixth Amendment.

5. Whether Rule 7(c), Federal Rules of Criminal Procedure, which requires an indictment to be a "plain, concise and definite written statement of the essential facts constituting the offense charged" is violated by a prolix indictment of 148 pages, weighing several pounds, and requires its dismissal.

6. Whether an indictment charging subornation of perjury is fatally defective in failing specifically to point out in plain, simple language just what was false, what was known to the witness who testified to be false and whether the defendant knew that it was false at the time of the alleged subornation and at the time of the testimony.

7. Whether an indictment for subornation of perjury is fatally defective in failing to allege that the defendant knew that the testimony which he influenced the suborned witness to give was false and that in giving such testimony the witness would wilfully and corruptly commit the crime of perjury.

8. Whether an indictment charging subornation of perjury and setting out that the matters were material must specify more than the conclusion that it is material and specify wherein the testimony was and is material so that the court, in the first instance, can determine whether

a crime has been charged and whether the defendant can have the protection on appeal and other proceedings of showing the lack of materiality of the matters alleged to have been suborned testimony.

9. Whether the appellee Root can raise the point as to the systematic exclusion of lawyers from the grand jury which returned the indictment as a violation of her constitutional rights under the Fifth and Sixth Amendments to the Constitution of the United States.

10. Whether the appellee Root can raise the point and have the court determine the invalidity of the indictment on the ground that women lawyers were excluded from the grand jury which returned the indictment.

11. Whether the court should strike the government's brief on appeal for non-compliance with the Rules of this court for failure to set out the prolix and lengthy indictment of 148 pages in its opening brief.

THE FACTS

As the government does not delineate all of the matters which are necessary to determine this appeal, we set forth a further statement of the facts in connection with it.

The appellee Gladys Towles Root is an attorney at law, who represented John William Irwin, one of the defendants in the so-called Sinatra kidnaping trial. George Forde, the other appellee, was attorney for Joseph Clyde Amsler. Both Irwin and Amsler are appellants and their appeal to this court in the so-called kidnaping case is pending, being No. 19509.

This is a response to an appeal by the government from an order dismissing a second indictment returned by the grand jury in this case on December 9, 1964. (C.T. 54)

A prior indictment was filed July 29, 1964. (C.T. 2) That indictment was dismissed November 2, 1964. (C.T. 53) No appeal was taken from the dismissal of the first indictment and the judgment of dismissal was and is final in respect to the matters set forth in the first indictment.

The appeal from the dismissal of the second indictment was taken on July 28, 1965. (C.T. 291-292)

The District Court dismissed the second indictment on the grounds that the indictment did not state an offense against the laws of the United States in that the indictment did not comply with Rule 7(c), Federal Rules of Criminal

Procedure, in that it was too lengthy; that it did not specify which false testimony "may, or may not, be found scattered somewhere among the 745 questions and answers that are contained in Counts II and III, or somewhere else in the 4500 pages of the Transcript of the evidence of the trial in Case No. 33,087-CR." (C.T. 287) The court found that the indictment fails to inform the defendants "of the charges against them so as to be able to know what they must meet to defend themselves, or, in case any other proceedings are taken against them, arising out of or related to their representation of the defendants in Case No. 33,087-CR., they could plead a former acquittal or conviction. The indictment thus does not state an offense and is ordered dismissed and defendants' bonds exonerated." (C.T. 287-288)

The notice of appeal was to the Court of Appeals for the Ninth Circuit and not to the Supreme Court of the United States, which appellee contends is the sole court which has jurisdiction from the construction of a rule or a constitutional provision. The language of Judge Hall in his dismissal is clearly within the language of the Sixth Amendment to the Constitution of the United States and involves a construction of that constitutional provision as well as a construction of Rule 7(c), Federal Rules of Criminal Procedure.

SUMMARY OF THE ARGUMENT

The cause is improperly appealed to the Court of Appeals for the Ninth Circuit. Section 3731 of Title 18, U.S. Codes, gives the government a right of direct appeal to the United States Supreme Court in cases involving the construction and interpretation of a constitutional provision or statute of the United States and excludes the Courts of Appeals from jurisdiction of such appeals.

The proper court, therefore, for this appeal is the Supreme Court of the United States and the Circuit Court is without jurisdiction in the matter.

The indictment in this case involves the construction and interpretation of Rule 7(c), Federal Rules of Criminal Procedure, as to whether an indictment of 148 pages, weighing several pounds, is a plain, concise and definite written statement of the essential facts constituting the offense charged.

The appeal by the government involves the construction and interpretation, inherently and as construed and applied in this case, of Rule 7(c), Federal Rules of Criminal Procedure under authority of U.S. v. Hvass, 353 US 570, 2 L.ed.2d 496. The jurisdiction of this appeal is in the Supreme Court of the United States.

The determination of the United States District Court on the first indictment, not appealed from, is the law of the case and is res judicata in this case and it covers

all the counts. The present indictment under appeal, being 148 pages, is neither a plain, concise nor definite written statement of the essential facts constituting the offenses charged. It is prolix, confusing, obscure and fails to inform the defendant and the court and jury of the nature and cause of the offense as required by the Sixth Amendment to the Constitution of the United States. It would also deprive the defendants, if required to be tried under it, of fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States.

Lawyers, as well as women lawyers, were intentionally excluded from the grand jury which returned the indictment, in violation of the Fifth Amendment to the Constitution of the United States. The striking of the cross-appeal did not bar the raising of this point on behalf of the appellee.

U.S. v. Meyer (5th Cir. 1959), 266 F.2d 747, 756

The indictment failed to point out, in each count thereof, where the testimony was material in the posture of this case. This was essential so the court could determine, in the first instance, whether an offense had been stated against the laws of the United States. The failure to set out and point out the materiality of the alleged perjury also made the indictment fatally defective in failing to state an offense against the laws of the United States.

ARGUMENT

I

AN APPEAL IN THIS CASE LIES EXCLUSIVELY TO THE SUPREME COURT OF THE UNITED STATES AND THE CIRCUIT COURT OF APPEALS LACKS JURISDICTION IN THE LIGHT OF THE PROVISIONS OF TITLE 18, SECTION 3731, U.S. CODES.

This court lacks jurisdiction to entertain the appeal because the indictment under submission requires a construction and interpretation of Rule 7(c), Federal Rules of Criminal Procedure.

Where the construction and interpretation of a Rule of Court is involved, similar to a statute, the United States Supreme Court has jurisdiction on direct appeal.

Title 18, Section 3731, U.S. Codes, states:

> "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> "From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or

information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

Appellee contends that, under the provisions of the foregoing section, this court lacks jurisdiction to entertain the appeal herein.

II

RULE 7(c), FEDERAL RULES OF CRIMINAL PROCEDURE, IS A STATUTE WITHIN THE MEANING OF TITLE 18, SECTION 3731, U.S. CODES, REQUIRING THE MATTER TO BE APPEALED DIRECTLY TO THE SUPREME COURT OF THE UNITED STATES AND RULES OF COURT ARE CONSTRUED SUCH STATUTES IN THE LIGHT OF U.S. v. CHARLES T. HVASS, 355 US 570, 2 L.ED. 2d 496.

The United States Supreme Court has held that a Rule of Court is a statute and the government should bring

its case to the Supreme Court of the United States by direct appeal.

U.S. v. Hvass, 355 US 570, 2 L.ed.2d 496, 78 S.Ct. 501

In the Hvass case, the question was directly raised in a perjury case involving an attorney becoming entitled to practice in the United States courts. The question arose as to whether under Title 28, U.S. Codes, Section 1654, 2071 and Rule 83, Federal Rules of Civil Procedure authorizing federal courts to prescribe rules for the conduct of their business and their Local Rule 3, Hvass had committed perjury under Rule 3 under which the defendant took his oath and whether this was such a law as was intended by Congress to support an indictment for perjury. The District Court dismissed the indictment on this ground (147 F.Supp. 594)

The government brought that case to the Supreme Court of the United States on the question of jurisdiction to the hearing on the merits (353 US 980, 1 L.ed.2d 1140). The court held that the expression "a law of the United States" is not limited to statutes but includes as well rules and regulations which have been lawfully authorized and have a clear legislative basis. (355 US 570, 575, 576)

Likewise, we contend that the question here is a construction of application of Rule 7(c). As such it is a statute within the meaning of Section 3731 requiring a direct appeal to the Supreme Court of the United States.

III

THE DISMISSAL OF THE FIRST INDICTMENT, WHICH WAS NOT APPEALED, IS RES JUDICATA AS TO THE SECOND AND SUPERSEDING INDICTMENT.

The first indictment, filed on July 29, 1964 (C.T. 2) and dismissed on November 2, 1964 (C.T. 53), covered similar allegations in three counts. No appeal was taken from the dismissal of the first indictment. This then became the law of the case and is res judicata.

U.S. v. Oppenheimer, 242 US 85, 87, 61 L.ed. 161

U.S. v. Di Angelo, 138 F.2d 466

Stroud v. U.S., 283 F.2d 137

Sealfon v. U.S., 332 US 575, 92 L.ed. 180

People v. Beltran, 94 Cal.App.2d 197, 202

74 Harvard L. Rev. 2931

1 Wharton 406

130 A.L.R. 374

140 A.L.R. 797

147 A.L.R. 991

65 Harvard L. Rev. 874

74 Harvard L. Rev. 1, 752

4 Stanford L. Rev. 536

In U.S. v. Oppenheimer, supra, the court says:

"It cannot be that the safeguards of the person so often and so rightly

mentioned with solemn reverence are less than those that protect from a liability in debt."

In the Oppenheimer case, supra, a defendant and others were indicted for conspiracy to conceal assets from a trustee in bankruptcy. The indictment was dismissed on the ground that the statute of limitations had run on the offense. However, a controlling decision in another action held that the particular statute did not apply in such a case and a new indictment for the same offense was brought. The court held that the second indictment was properly quashed. Although the defendant had not been in jeopardy, the court held that the first judgment was a conclusive adjudication in favor of the defendant on his defense.

In Sealfon v. U.S., 332 US 575, 92 L.ed. 180, the defendant had been acquitted of conspiring to defraud the government by presenting false invoices. In a trial on the second indictment charging commission of the substantive offense of uttering and publishing the false invoices, he was convicted of aiding and abettting. Since conspiracy is a crime distinct from the substantive offense, there was no double jeopardy but the court held that the first judgment was a conclusive determination in favor of the defendant of the facts essential to the conviction of the offense charged in the second prosecution. The court held that this could not be done.

See also the following cases:

U.S. v. Salvatore, 140 F.2d 470

Wheatly v. U.S., 286 F.2d 519

U.S. v. Ragell Perez, 179 F.Supp. 619

IV

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE INDICTMENT IN THIS CASE, AS CONSTRUED AND APPLIED, VIOLATED THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND RULE 7(c), FEDERAL RULES OF CRIMINAL PROCEDURE, IN THAT AN INDICTMENT OF 148 PAGES, AND WEIGHING SEVERAL POUNDS, COULD NOT BE INTERPRETED AS BEING A PLAIN, CONCISE AND DEFINITE WRITTEN STATEMENT OF THE ESSENTIAL FACTS CONSTITUTING THE OFFENSE CHARGED.

The trial court, in dismissing this indictment, said:

> "While the indictment is thus cast in five counts, it is apparent that the gravamen of the offenses charged is that the defendants induced Amsler and Irwin to testify falsely concerning matters which are described only by subject matter in Counts I, IV and V, which false testimony may, or may not, be found scattered somewhere among the 745 questions and answers that are contained in Counts II and III, or somewhere else in the 4500 pages of the Transcript of the evidence of the trial

in Case No. 33,087-CR.

"Since taking the Motions to Dismiss under submission, the Court has carefully and repeatedly examined the indictment and the authorities cited by the parties, as well as many others, and cannot conscientiously come to a judgment that the defendants are sufficiently informed by the indictment of the charges against them so as to be able to know what they must meet to defend themselves, or, in case any other proceedings are taken against them, arising out of or related to their representation of the defendants in Case No. 33,087-CR., they could plead a former acquittal or conviction. The indictment thus does not state an offense and is ordered dismissed and defendants' bonds exonerated." (C.T. 287-288)

The indictment in this case violates the Sixth Amendment to the Constitution of the United States requiring that a defendant be informed of the nature and cause of the accusation. That amendment has been the law and still is the law.

U.S. v. Cruikshank, 92 US 542, 23 L.ed. 588

Russell v. U.S., 369 US 749, 8 L.ed.2d 240

We will deal with the application of Rule 7(c), Federal Rules of Criminal Procedure, as it construes and applies the Sixth Amendment to the Constitution in our next point.

V

RULE 7(c), FEDERAL RULES OF CRIMINAL PROCEDURE, WHICH REQUIRES AN INDICTMENT TO BE A "PLAIN, CONCISE AND DEFINITE WRITTEN STATEMENT OF THE ESSENTIAL FACTS CONSTITUTING THE OFFENSE CHARGED" IS VIOLATED BY A PROLIX INDICTMENT OF 148 PAGES, WEIGHING SEVERAL POUNDS, AND REQUIRES ITS DISMISSAL.

The indictment in this case violates Rule 7(c), Federal Rules of Criminal Procedure.

Rule 7(c), Federal Rules of Criminal Procedure, provides:

> "Nature and contents. The indictment of the information shall be a plain, concise and definite written statement of the essential facts constituting the

offense charged ..."

Certainly it cannot be said that the indictment in this case is plain, concise and a definite written statement of the essential facts constituting the offense charged. By this language the rule meant to exclude non-essential facts under the rule of inclusio unius est exclusio alterius. The maxim means that it excludes from its effect all those matters not expressly mentioned; it means the inclusion of one thing is the exclusion of another.

Burgin v. Forbes, 169 S.W.2d 321, 325

Therefore, the rule intended to exclude all of the non-essential facts to the charge and in this case, the non-essential matters embracing the charge of perjury. The various counts, therefore, contain unessential matters, making for an indictment of 148 pages. Can such an indictment be said to be "concise"?

Concise statement of cause of action requires terseness of statement as distinguished from long and prolis history.

Dallas RR & Terminal Co. v. Sutherland, Texas, 27 S.W.2d 830, 832

In Taylor v. Neal, 157 N.E. 646, 260 Mass. 427, the complaint of 231 pages was held violative of that state's rule requiring a concise statement and demurrers thereto rightly sustained.

Under Rule 29 for Government of Courts of Civil Appeal

the Texas court held that the words "concise statement of the case", concise means "stated in a few words".

West Texas Utilities Co. v. Pennington, Texas, 11 S.W.2d 583, 584

The words mean the elimination of a long and prolix statement with a multitude of impertinent allegations.

McLaughlin v. Emery, 44 Mo. 350, 354

Chasson v. Marley, 28 S.E.2d 223, 224, 223 N.Car. 738

The word concise is defined as "brief, short; containing a few words or the principal matters only".

Curtiss v. Corbett, (N.Y.) 25 Howe's Pra. 58, 62, 63

The indictment in this case is therefore violative of Rule 7, Federal Rules of Criminal Procedure in that it is not (1) concise and (2) not confined to the essential facts constituting the offense.

Government counsel in his oral argument in the District Court acknowledged that parts of the indictment contained matters which are true and said he could pinpoint, if given time, the parts that he alleges are false. But he can do this only because of his familiarity with the case. It is not a plain, concise statement to one unfamiliar with the case.

In U.S. v. Cruikshank, 92 US 542, 575, 558, 23 L.ed.588 the Supreme Court of the United States said:

"In criminal cases prosecuted under the laws of the United States the accused has the constitutional right 'to be informed of the nature and cause of the accusation'. Amendment VI. In U.S. v. Mills, 7 Pet. 142 this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged' and in U.S. v. Cook, 17 Wall. 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged'. It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species, -- it must descend to particulars.' (1 Arch. C.R. and P.L. 291). The object of the indictment is, first, to furnish the accused with such a description of the charge against him that it will enable him to

make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances.

"It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charges against him and the court must be able to decide whether the property taken was such as was the subject of larceny."

See also:

The Schooner Hoppet and Cargo v. U.S., 7 Cranch 389, 3 L.ed. 380

Pettibone v. U.S., 148 US 197

U.S. v. Standard Brewery, 251 US 210

Wear v. U.S., 1 F.2d 617

U.S. v. Cook, 17 Wall. 168, 174, 21 L.ed. 738

Ledbetter v. U.S., 170 US 606, 611, 42 L.ed. 1162

Russell v. U.S., 369 US 749, 8 L.ed.2d 240

U.S. v. Debrow, 203 F.2d 699, 702

An example of an indictment specifically setting out what the proposed perjury was to be is contained in U.S. v. Debrow, 203 F.2d 699, 702, footnote 1. There the grand jury charged as follows, giving exactly the testimony that allegedly was supposed to be false and that it was known to the defendant to be false:

"THE GRAND JURY CHARGES:

"1. That on or about the 9th day of April, 1951, at Jackson, and within the Southern District of Mississippi,

HENRY DEBROW,

the defendant herein, having duly taken an oath before a competent tribunal, to wit: a subcommittee of the Senate Committee on Expenditures in the Executive Departments known as the Subcommittee on Investigations, a duly created and authorized subcommittee of the United States Senate conducting official hearings in the Southern District

of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered, that he would testify truly, did unlawfully, knowingly and wilfully, and contrary to said oath, state a material matter which he did not believe to be true, that is to say:

"2. That at the time and place aforesaid, the said Senate Subcommittee inquiring as aforesaid was conducting a study and investigation of whether applicants for appointment to offices and places under the government of the United States had been and were being solicited and required by numerous persons within the State of Mississippi to make political contributions and donations as a condition precedent to receiving such appointments, and as a consideration in return for promises to use their support and influence in obtaining said offices and places for applicants seeking appointment thereto; and to determine whether the laws of the United States had been violated in connection with and

as a result of such activities, the identity of any such person engaged therein, and the extent to which such improper and corrupt activities affected the operation of departments and agencies of the United States.

"2. That at the time and place aforesaid the defendant

HENRY DEBROW

duly appearing as a witness before the Senate Subcommittee and then and there being under oath as aforesaid, testified falsely before said Subcommittee with respect to the aforesaid material matter as follows:

"SENATOR HOEY: Go ahead and state just what that situation was.

"MR. DEBROW: *** On the way up Professor Hill said to me, 'Mr. Debrow, you knowing these fellows, I would like to make a thousand dollar contribution. Would you make it for me?' I said, 'Providing you are present, I will be glad to.'

"4. That the aforesaid testimony of the defendant, as he then and there well knew and believed was untrue in that on the

way up to the Century Building, at Jackson, Mississippi, to see the members of the Mississippi Democratic Committee, Professor Hill did not state to the defendant that he would like to make a thousand dollar contribution to the Committee and requested the defendant to make the contribution for him. (Sec. 1621, Title 18, U.S.C.)"

Compare this with the indictment in the present case which fails to set forth any facts and is based purely on conclusions of the pleader.

It will be noted in the indictment against the defendants that the indictment is not even in the language of the statute but is in general terms, so vague and uncertain that one must guess first at what the case was that was on trial. (Is the government afraid to mention Sinatra, Jr.?) Nor is the language of the statute followed in respect to the three transactions. Nevertheless, even if the language of the statute were followed, due process requires that the defendant be given notice of the nature and cause of the accusation. (Fifth Amendment and Sixth Amendment, United States Constitution.) This has always been the law, which is now reaffirmed and reiterated in Russell v. United States, 369 US 749, 765, 766, 8 L.ed.2d 240 (1962). Although this was not a conspiracy case it reaffirmed the law of conspiracy as we have set it out in United States v. Cruikshank,

supra, which was an early conspiracy case.

Although some cases seem to indicate in alleging conspiracy to commit a public offense it is not necessary to allege the offense alleged to have been conspired to be committed with the same degree of particularlity required of an indictment alleging the commission of the offense itself, nevertheless Russell v. United States, 369 US 749, 765, 766, and Stirone v. United States, 361 US 212, 4 L.ed. 2d 225, dispell this view and reaffirm United States v. Cruikshank in 92 US 542, 23 L.ed. 588.

Russell v. United States, supra, says that

> "These basic principles of fundamental fairness (referring to the minimum standard of apprising the defendant of the nature of the charges called upon to defend and descending to particulars) retain their full vitality under modern concepts of pleadings, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure."

The recent federal decisions which the Supreme Court cites are very much in point. First there is United States v. Simplot (DC Utah, 1961), 192 F.Supp. 734. This again was not a conspiracy case. But the indictment had charged perjury by saying that the defendant had committed perjury by testifying falsely on a material matter, namely, "an alleged conversation between himself and John Archer in Sun

Valley, Idaho, in the spring of 1954, concerning the termination of their business relationship". The indictment was dismissed because it did not allege what the false testimony was. So we learn from United States v. Simplot that perjury is among those crimes which cannot be pled in the generic language of the statute.

Two of the other recent federal decisions cited in the Russell case involved conspiracy indictments. One is United States v. Devine's Milk Laboratories (DC Mass., 1960) 179 F.Supp. 799. The indictment alleged the following conspiracy:

> "... to commit certain offenses against the United States, that is to say, the offenses denounced by the provisions of Title 18 U.S.C. §§287 and 1001, to knowingly and willfully make and use, and cause to be made and used, false, fraudulent and fictitious statements in matters within the jurisdiction of the Department of the Army, an agency of the United States, and to knowingly and willfully make and present false, fictitious and fraudulent claims to the Department of the Army, an agency of the United States, all in violation of Title 18, U.S.C. §371."

The indictment was held insufficient. The court said that in the case of a conspiracy to commit an offense the

statement which is claimed to be false must be set forth, and if it is not the defect cannot be cured by reference to the overt acts. The latter point is not material to our problem because the overt acts in Count One of the indictment do not give any indication of what the alleged false testimony was even if they could be referred to. The first point, however, is directly analogous. Perjury and the making of false statements are similar things. Each involves the saying of something that is false. If particularity is required of one, there is no reason for not requiring it of the other. Further, we know from United States v. Simplot that an indictment charging perjury must allege what the false testimony was in order to satisfy the minimum standards of apprising the defendant of what he must defend against. There is no reason for distinguishing a conspiracy case in this regard. If fundamental fairness requires apprising the defendant of what the false testimony was when he is charged with perjury, it is just as necessary to apprise him of this when he is charged with conspiracy to do the same thing.

The other conspiracy case cited with approval in Russell v. United States is United States v. Apex Distributing Co. (DC R.I., 1957), 148 F.Supp. 365. The significance of this case is in illustrating various types of offenses which may not be pled in the generic language of the statute. The following portions of a conspiracy count

were held insufficient:

> "B. To commit certain offenses against the United States, to wit:
>
> "1. The crime of bribery in violation of Title 18, U.S.C., §201;
>
> "2. The crime of knowingly making false statements and entries in violation of Title 18, U.S.C., §1001;
>
> "3. The crime of knowingly and fraudulently obtaining from the United States moneys in excess of $100.00 by means of false and fictitious invoices in violation of Title 18, U.S.C., #1003;
>
> "4. The crime of knowingly making false, fictitious and fraudulent claims against the United States in violation of Title 18, U.S.C., §287;
>
> "5. The crime of knowingly and with intent to defraud and mislead, introducing and delivering for introduction into interstate commerce certain misbranded food in violation of Title 21, U.S.C., §331 et seq."

In the light of these principles, let us now examine Count One of the indictment in detail. It charges a conspiracy to commit three offenses, namely:

1. Perjury.

2. Influencing witnesses.

3. Obstruction of justice.

PERJURY

As to perjury, the indictment says that the defendants conspired as follows:

Page 1, lines 30-32: "2. To commit perjury in the United States District Court for the Southern District of California in Case 33087-CD in violation of 18 U.S.C. §1621; and"

Page 2, lines 15-19: "It was further part of said conspiracy that unindicted co-conspirators Irwin and Amsler would commit perjury and testify falsely and contrary to the oath of a witness in Case 33087-CD in the United States District Court for the Southern District of California."

This portion of the charge is patently deficient for at least two reasons:

One. It does not state or indicate in any way what the alleged false testimony was. It does not even indicate what the subject matter of the testimony was. And it does not even indicate the nature of the case in which the perjury was to be committed. This is an essential element of an indictment charging conspiracy to commit perjury.

Two. If we assume that conspiracy to commit perjury could be pled in the generic language of the statute, which it cannot, the indictment is still deficient. One element of the crime is that the false statement be as to a material

matter. 18 USCA 1621. Materiality is not even pled here by way of conclusion.

INFLUENCING WITNESSES

As to influencing witnesses, the indictment says that the defendants conspired as follows:

Page 1, lines 26-29: "1. To corruptly endeavor to influence, intimidate, and impede witnesses in the discharge of their duties as witnesses in the United States District Court for the Southern District of California inCase 33087-CD, in violation of 18 USCA §1503;"

Page 2, lines 11-14: "It was part of said conspiracy that witnesses would be instructed to testify falsely and contrary to the oath of a witness, in Case 33087-CD in the United States District Court for the Southern District of California."

This portion of the charge is subject to the same criticism. The first part appearing at page 1, lines 26-29, is nothing more than a paraphrasing of the first clause of 18 USCA 1503, which reads: "Whoever corruptly ... endeavors to influence, intimidate or impede any witness, in any court of the United States. ..."

This is a statement of the offense in the most general terms possible. The pleading leaves it to speculation as to why the endeavor was corrupt, and whether the means of the endeavor was to influence, intimidate or impede. The most serious deficiency is in failing to state the object of

the endeavor, i.e., whether it was to induce the witnesses not to testify, to testify falsely, or in some other manner to fail to discharge their duties as a witness. There is an attempt to avoid the latter deficiency only in the portion of the indictment at page 2, lines 11-14. Here it is said that, "witnesses would be instructed to testify falsely and contrary to the oath of a witness, in Case 33087-CD". So the indictment says that the object of the endeavor was to induce the witnesses to commit perjury. Thus we are led into the same situation - perjury. If that is the claim, and it is the only one that appears from the indictment, then it is essential to show what the false testimony was and how and in what manner it was material.

OBSTRUCTION OF JUSTICE

As to obstructing justice, the indictment says that the defendants conspired as follows:

Page 2, lines 1-5: "3. To corruptly influence, obstruct and impede and endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the Southern District of California in case 33087-CD, in violation of 18 USCA §1503."

Page 2, lines 20-29: "It was further part of said conspiracy to endeavor to influence, obstruct and impede the due administration of justice and prospective jurors, jurors, prospective witnesses, and witnesses prior to and during the trial in Case 33087-CD in the United States

District Court for the Southern District of California, by conveying and publishing both in the courtroom and outside of the courtroom, the false information that there was bona fide evidence that no crimes were committed because the alleged criminal acts were arranged as a publicity stunt and hoax by and on behalf of the alleged victim well knowing that there was no such evidence."

The first portion at page 2, lines 1-5, is a paraphrasing of the generic language of the last clause of 18 USCA 1503: "Whoever ... corruptly ... influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice. ..."

The explanation of what it is that it is claimed to be an endeavor to obstruct justice is in the second portion at page 2, lines 20-29. That explanation is, and the charge therefore is, that the defendants conspired to endeavor to obstruct justice by making the claim that there was bona fide evidence that the Frank Sinatra, Jr. kidnapping was a hoax, knowing that there was no such evidence. There are two good reasons why this does not state a public offense.

One: Stated in the worst abstract way possible, the charge is that the defendants conspired to tell lies. It is not charged that they conspired to tell lies under oath. Lying is a reprehensible thing, but the only kind of lying that is criminal is lying under oath. That is not the

charge made here, and no public offense is stated.

Two: It is not necessary to interpret the indictment in that way. The charge is that the defendants falsely claimed that there was bona fide evidence. Why the word bona fide? When you consider a few other undisputed facts, this will become significant. First, Root and Forde are lawyers. They represented Irwin and Amsler, two of the defendants in Case No. 33087-CD, which was the Frank Sinatra, Jr., kidnapping case. Second, Root and Forde raised the defense that their clients were not guilty because of consent of the alleged victim. The theory of their defense was that the kidnapping had been arranged by or on behalf of Frank Sinatra, Jr., as a publicity stunt. In raising this defense Root and Forde stated in their opening statements that they expected to prove this defense. In their closing arguments they stated that they believed that they had proved this offense.

Now, let us assume first that there was no evidence whatsoever for the claimed defense. Is that a crime? Does a lawyer obstruct justice when he claims in his opening statement that he will prove a fact and then fails to prove it? Does he obstruct justice when he argues at the end of his case that he has proved a fact and nobody believes him? If these things be considered an obstruction of justice, then our adversary system is in itself an obstruction of justice.

But the assumption of no evidence is not our situation anyway. We now come to the significance of the word bona fide. The indictment does not say that there was no evidence. It says that there was no bona fide evidence. So the indictment admits that there was evidence, but says that the defendants obstructed justice because their evidence was not bona fide. This is not an oversight on the part of the pleader. Consider this evidence, a good deal of which was corroborated by the alleged victim. In the getaway car were Amsler, Keenan and Frank Sinatra, Jr. At one point of getaway the car was stopped. It was snowing. Amsler ran and hid some distance from the car because a police car was approaching and did in fact stop to investigate. Keenan was out of the car working on the tire chains. Frank Sinatra, Jr., was in the back seat of the car. He did nothing when the police investigated. Up to that point Amsler and Keenan had guns. They then threw them away. In order to avoid detection (of three men in a car), Amsler concealed himself in the trunk, Keenan drove, and Frank Sinatra, Jr., rode in the back seat. They were thus able to clear several roadblocks. At no time did Sinatra, Jr., do or say anything to indicate that he was being kidnapped. Reasonable men can differ as to what inferences to draw from this evidence. But surely it cannot be said that a lawyer is guilty of crime in arguing from it his or her inferences as to what it shows regarding the kidnapping and

whether it was consented to and whether it was a genuine kidnapping.

There was other evidence, albiet disputed and much of it hearsay, which bears more directly on the defense claimed. The point, however, is illustrated by the above described evidence which is uncontradicted. The point is that this indictment charges two lawyers with conspiring to obstruct justice by raising what the Government claims to be a spurious defense in behalf of their clients in a criminal case. No case that we have read has ever held or even suggested that this is a crime. It is easy to conceive why the prosecutor would be in favor of such a rule. It would give him a great measure of control over the manner in which his prosecutions were defended. To put it bluntly, his job would be much easier than it is now, and justice, as he sees it, would be duly administered with much greater dispatch. Even the most fearless lawyer would be hesitant to incur the wrath of the prosecutor. All criminal cases would necessarily be defended at the risk of indictment for obstructing justice if they are lost. If we call it an obstruction of justice to claim an affirmative defense without evidence to support it, there is no reason to stop there. Would it not be just as much an obstruction to the due administration of justice to plead not guilty and stand trial when the evidence of guilt is conclusive?

Counsel suggested that the defense could strike matters

as surplusage. That is not the job of the defense, but the task of the prosecutor in returning the indictment.

Furthermore, an indictment cannot be amended but must be re-submitted to the grand jury.

In Russell v. U.S., 369 US 749, 8 L.ed.2d 240, the Supreme Court said:

> "A grand jury, in order to make the ultimate determination (whether a person should be held to answer in a criminal trial...) must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of the grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. See Orfield, Criminal Procedure From Arrest to Appeal, 243.
>
> "This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by re-submission to the grand jury,

unless the change is merely a matter of form. Ex parte Bain, 121 US 1, 30 L.ed. 849, 7 S.Ct. 781; United States v. Norris, 281 US 619, 74 L.ed. 1076, 50 S.Ct. 424; Stirone v. United States, 361 US 212, 4 L. ed.2d 252, 80 S.Ct. 270. 'If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed. ... Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as

presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists.' Ex parte Bain, supra (121 US at 10, 13). We reaffirmed this rule only recently, pointing out that 'The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.' Stirone v. United States, supra (361 US 218).

"For these reasons we conclude that an indictment under 2 USC §192 must state the question under congressional committee inquiry as found by the grand jury. Only then can the federal courts responsibly carry out the duty which Congress imposed upon them more than a century ago:

"'The question must be pertinent to the subject-matter, and that will have to be decided by the courts of justice on the indictment.'

"Emphasis added."

Thus the statement of counsel to strike is an admission that the indictment is defective and any alteration of the indictment in its context is not a change in merely a matter of form but of substance and would change the indictment from what the grand jury had returned to something that the prosecutor and the court subsequently guessed was in the minds of the grand jury.

We respectfully submit, then, that this indictment is defective because it violates Rule 7, Rules of Criminal Procedure, and is not a plain, concise and definite written statement of the essential facts constituting the offense charged.

In a perjury case which also includes subornation of perjury, the indictment which contains material and immaterial matters must be specific as to the material matters alleged to be perjurious or the indictment is defective and fails to apprise the defendant of the specific offense which he is charged with and required to meet.

U.S. v. Cobert, 227 F.Supp. 915

See also:

48 C.J. 879, §128

U.S. v. Seymour, 50 F.2d 930

In U.S. v. Laut, 17 F.R.D. 31, at 34, the indictment failed to inform the defendant of definite portions of his testimony material to the inquiry, though it detailed specific questions and answers. The court held that materiality

or pertinency as considered in relation to perjury is not a mere personal privilege but is an essential element of the crime of perjury. Apparently in that case, as in the case at bar, there were included a series of most irrelevant statements so far as the charges were concerned. The court held that the allegations must show that the false statements are material to the matters at bar.

The court there said:

> "Not only does Count Two swallow up the most irrelevant of defendant's 1950 statements, but, equally important, it does not require that such untruths were knowingly or wilfully uttered in 1950. As a result, the slightest mistake in 1950, knowingly repeated in 1951, would warrant conviction. To sustain that count would thus be to make lying itself, apart from the import or relevance of the matter queried, material to the 1951 hearing.
>
> "Such a result would in effect read materiality out of the statute and flaunt apparent Congressional purpose. In naturalization proceedings, like most hearings, questions posed range from the trifling to the crucial. Queries may be, as one Court of Appeals recently observed, merely

'preliminary in nature', not 'themselves pertinent', but asked on the mere 'possibility that they might [lead] to later relevant questions.' Bowers v. United States, 1953, 92 US App. D.C. 79, 202 F.2d 447, 452. Even relevant questions, moreover, may lack that 'substantial degree' of importance needed to make them material. United States v. Lattimore, D.C. Cir. 1954, 215 F.2d 847, dissent by Edgerton, J.; see also La Salle v. United States, 10 Cir. 1946, 155 F.2d 452, 454; Pyle v. United States, 1946, 81 U.S. App.D.C. 209, 156 F.2d 852, 856; Central & Southwest Utilities Co. v. Securities and Exchange Commission, 1943, 78 U.S. App. D.C. 37, 136 F.2d 273, 275; Robinson v. United States, 1940, 72 App. D.C. 254, 114 F.2d 475, 476. Enacting Section 1015(a) Congress aimed, not at such trivia, but rather at false testimony likely to mislead immigration or naturalization officials in the conduct of their appointed tasks. So it is that, construing this statute as well as its earliest forerunners, courts have without exception held that, though materiality is not specified, the false state-

ments alleged must be material to the matter at bar. Bridges v. United States, 9 Cir. 1952, 199 F.2d 811, 829, reversed on other grounds 1953, 346 US 209, 73 S.Ct. 1055, 97 L.ed. 1557; United States v. Bressi, D.C. Wash. 1913, 208 F. 369, 371; see also United States v. Sebastiannelli, D.C.M.D. Pa. 1933, 3 F.Supp. 698.

"To accord with Congressional design, Section 1915(a) should be read in the same light as analogous provisions which specify that false statements charged must be material. And, it seems to me clear, as one Court of Appeals recently held, that materiality or 'pertinency' is not a mere 'personal privilege *** waived if not seasonably asserted' by refusal 'to answer a question which is not pertinent', but instead an essential 'element of the criminal offense which must be shown by the prosecution.' Bowers v. United States, 1953, 92 U.S. App. D.C. 79, 202 F.2d 447, 452; see also United States v. Lattimore, D.C. Cir. 1954, 215 F.2d 847. Where materiality is not shown, the indictment thus must fail. See Bowers v. United States, 1953, 92 U.S. App. D.C. 79, 202 F.2d 447, 452; United

States v. Garvett, D.C.E.D. Mich. 1940, 35 F.Supp. 644; United States v. Seymour, D.C.D. Neb. 1931, 50 F.2d 930; United States v. Cameron, D.C.D. Ariz. 1922, 282 F. 684; United States v. Rhodes, D.C. S.D. Ala. 1913, 212 F. 518; United States v. Pettus, C.C.W.D. Tenn. 1897, 84 F. 791; United States v. Perdue, D.C.W.D. Pa. 1880, 4 F. 897.

"Beyond doubt, Count Two charges no probably material false statement. Alleged only is that defendant in 1951 knowingly lied about the truth of any of his 1950 statements. Since many of defendant's 1950 answers were not then material, lying about the truth of any one of them one year later, during rehearing of the same issue, must likewise be immaterial. Apart from this defect under Section 1015(a), this pervasive charge, in addition, falls since it 'fail[s] to inform the defendant of the definite portions of his testimony which were material to the inquiry.' United States v. Seymour, D.C. Neb. 1931, 50 F.2d 930; see also F.R. Crim. Proc. 7(c), 18 U.S.C."

The court further said:

"'"*** [T]he facts set forth as falsely *** sworn to should be sufficient in them-

selves to show such materiality."' Markham v. United States, 1895, 160 US 319, 325, 16 S.Ct. 288, 291, 40 L.ed. 441. Such facts may 'not be left to surmise or to be reached by way of inference or argument.' Danaher v. United States, 8 Cir., 1930, 39 F.2d 325, 327; see United States v. Seymour, D.C.D. Neb. 1931, 50 F.2d 930."

Summing up, we submit that the rule regarding perjury indictments is that where the indictment contains both material and non-material matters that the materiality must be specifically shown and set out.

Russell v. U.S., 369 US 749, 8 L.ed.2d 240

We respectfully submit that the construction and interpretation of Rule 7(c), Federal Rules of Criminal Procedure, require this Court to uphold the dismissal of the indictment.

VI

AN INDICTMENT CHARGING SUBORNATION OF PERJURY IS FATALLY DEFECTIVE IN FAILING SPECIFICALLY TO POINT OUT IN PLAIN, SIMPLE LANGUAGE JUST WHAT WAS FALSE, WHAT WAS KNOWN TO THE WITNESS WHO TESTIFIED TO BE FALSE AND WHETHER THE DEFENDANT KNEW THAT IT WAS FALSE AT THE TIME OF THE ALLEGED

SUBORNATION AND AT THE TIME OF THE TESTIMONY.

U.S. v. Dennee, Fed.Cas. No. 14,947, involved an action in the Court of Claims by one Harriet Mills against the United States to recover proceeds of 100 bales of cotton which she said were taken by the military forces in August of 1876 and afterwards sold and the proceeds, amounting to $40,000, was paid into the Treasury of the United States. The indictment alleged that the defendant, a lawyer, R. Stewart Dennee and Samuel Gamage, a yeoman, "unlawfully, corruptly, wickedly and maliciously did solicit, suborn and instigate and endeavor to persuade and did then and there suborn, instigate and procure one Martha L. Knight to appear before Robert H. Shannon, a United States Court Commissioner authorized to administer oaths, and did then and there wickedly and corruptly instigate and procure the said Martha L. Knight to give evidence and her deposition in said issue ... and upon her corporal oath, duly administered according to law, to falsely swear and give evidence to certain matters material and relevant to the said issue, and to matters therein and thereby put in issue and to the effect following, that is to say..." The court then sets out a requirement of subornation of perjury in its opinion:

> "The crime of subornation of perjury has several indispensable ingredients which must be charged in the indictment or it will be fatally

defective: (1) The testimony of the witness suborned must be false. (2) It must be given willfully and corruptly by the witness, knowing it to be false. (3) The suborner must know or believe that the testimony of the witness given, or about to be given will be false. (4) He must know or believe that the witness will willfully and corruptly testify to facts which he knows to be false. A careful scrutiny of the counts of this indictment fails to reveal any averment that the defendants knew or believed that the testimony of the witness whom they are charged with suborning would be false, or that they knew it was false, or that they knew that the witness knew it was false, or that they knew that she would willfully and corruptly testify, or had willfully and corruptly testified to facts as true, knowing them to be false.

"To make a good indictment for subornation of perjury the false swearing must be set out with the same detail as an indictment for perjury, and the indictment must charge that the defendants procured the witness to testify knowing that the testimony would be false, and knowing that the witness knew that the testimony he had given, or was about to give, was false, and knowing that he

would corruptly and willfully give false testimony. In the case of Com. v. Douglass, 5 Metc. [Mass.] 244, the defendant was indicted for subornation of perjury. On the trial the court below instructed the jury that 'if it was proved to them beyond a reasonable doubt that the defendant on the former trial for forgery (referred to in the indictment) put Fanny Crossman on the stand or caused her to be put on the stand as a witness, knowing that she would testify as set forth in the indictment, and intending that she should so testify, and he put her on the stand, or caused her to be put on the stand for the purpose of her so testifying, and she did so testify and such testimony was false, and he knew when he put her on the stand, that if she did so testify her testimony would be false; it would be sufficient to prove that part of the indictment which alleged that defendant suborned Fanny Crossman to commit perjury as set forth in the indictment.'

"This charge was assigned for error, and the supreme judicial court in passing upon it said: 'The reamining exception to the charge of the presiding judge is of more importance, and is, we think, well founded. The jury were instructed that if certain facts stated in the exceptions were

proved beyond reasonable doubt, it would be sufficient proof of that part of the indictment which charged that the defendant suborned Fanny Crossman to commit perjury. Now, we are of opinion that all these facts might exist and yet the defendant might not be guilty of the crime charged in the indictment. The defendant might know or believe -- for he could not know with certainty -- that the witness whom he called would testify as she did, and he mightknow that her testimony would be false, but if he did not know that she would willfully testify to a fact knowing it to be false, he could not be convicted of the crime charged. If he did not know or believe that the witness intended to commit the crime of perjury, he could not be guilty of the crime of suborning her. To constitute perjury the witness must willfully testify falsely, knowing the testimony given to be false. 1 Hawk. P.C. c. 69, §2; Bac. Abr. "Perjury," A; 2 Russ. Crimes, 1753. A witness, by mistake or defect of memory, may testify untruly without being guilty of perjury or any other crime.' Subornation of perjury is in its essence but a particular form of perjury itself. 2 Bish.Cr. Law, §1197. See, also, What. Prec. Ind. pp. 598, 599, forms c.d. See, also, form of indictment in

Archb. Cr. Pl. & Ev. pp. 575, 577. See same form, 2 Bish. Cr. Proc. §878; State v. Carland, 3 Dev. 114.

"Tested by these authorities, both counts of the indictment are bad, first, because they do not aver that the defendants knew that the testimony which they instigated the witness to give was false, and second, because there is no averment that the defendants knew that the witness knew that the testimony she was instigated to give was false.

"Demurrer sustained."

We submit that each of the counts herein contain the same fatal defect as was contained in U.S. v. Dennee, supra.

We adopt the further argument made by counsel for appelee Forde on this point as well as on other points in order to prevent repetition.

VII

AN INDICTMENT FOR SUBORNATION OF PERJURY IS FATALLY DEFECTIVE IN FAILING TO ALLEGE THAT THE DEFENDANT KNEW THAT THE TESTIMONY WHICH HE INFLUENCED THE SUBORNED WITNESS TO GIVE WAS FALSE AND THAT IN GIVING SUCH TESTIMONY THE WITNESS WOULD WILFULLY AND CORRUPTLY COMMIT THE CRIME OF PERJURY.

The argument under this point is contained in the argument under Point VI and is incorporated hereunder by reference.

VIII

AN INDICTMENT CHARGING SUBORNATION OF PERJURY AND SETTING OUT THAT THE MATTERS WERE MATERIAL MUST SPECIFY MORE THAN THE CONCLUSION THAT IT IS MATERIAL AND SPECIFY WHEREIN THE TESTIMONY WAS AND IS MATERIAL SO THAT THE COURT, IN THE FIRST INSTANCE, CAN DETERMINE WHETHER A CRIME HAS BEEN CHARGED AND WHETHER THE DEFENDANT CAN HAVE THE PROTECTION ON APPEAL AND OTHER PROCEEDINGS OF SHOWING THE LACK OF MATERIALITY OF THE MATTERS ALLEGED TO HAVE BEEN SUBORNED TESTIMONY.

The rule requiring that an indictment set forth the essential facts, to-wit: Rule 7(c), Federal Rules of Criminal Procedure, as well as the Sixth Amendment, does not eliminate the requirement that an indictment must set forth the essential facts showing materiality which is an essential ingredient in the crime of perjury and subornation of perjury.

U.S. v. Laut, 17 F.R.D. 31, at 34

Russell v. U.S., 369 US 749, 8 L.ed.2d 240

The effect of failing to allege materiality would swallow up Rule 7(c) and also the Sixth Amendment.

We have set forth the argument on materiality in more detail under Point V .

See also:

Bowers v. U.S., 92 U.S. App. D.C. 79, 202 F.2d 449, 452

U.S. v. Garvett, 35 F.Supp. 644

U.S. v. Seymour, 50 F.2d 930, 940

U.S. v. Cameron, 282 F. 684

U.S. v. Rhodes, 212 F. 518

Danaher v. U.S., 39 F.2d 325, 327

IX

THE APPELLEE ROOT CAN RAISE THE POINT AS TO THE SYSTEMATIC EXCLUSION OF LAWYERS FROM THE GRAND JURY WHICH RETURNED THE INDICTMENT AS A VIOLATION OF HER CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The trial court rejected additional grounds raised by appellee Root that systematic exclusion of lawyers (C.T. 215) was not a ground on which he acted and he specifically denied these grounds. (C.T. 288)

This does not preclude consideration of those grounds on this appeal.

U.S. v. Meyer, 266 F.2d 747, 756

Jaffke v. Dunham, 352 US 280, 281, 1 L.ed.2d 314

U.S. v. Curtiss-Wright Export Corporation, 299 US 304, 329, 330, 81 L.ed. 255

U.S. v. Kahriger, 345 US 22, 33 (footnote 14), 97 L.ed. 754

Posey v. Tennessee Valley Authority (5th Cir. 1937), 93 F.2d 726

The court incorrectly denied the motion to dismiss the indictment upon the grounds that the grand jury which returned the indictment was illegally constituted in that there was systematic exclusion of lawyers as a class from the grand jury, and particularly women lawyers.

Such an exclusion violates due process of law and the equal protection of the laws guaranteed by the Fifth Amendment to the Constitution of the United States and the provisions of the Sixth Amendment to the Constitution of the United States.

There is nothing about a lawyer, as a class, that gives rise to any reason why he should be excluded from jury service. Until the order of the District Court in Los Angeles elminating lawyers as a class, lawyers were permitted to sit on juries and grand juries and they are

known to be permitted to sit in other Districts and other areas.

That they may be challenged, or that their type of work may be such as to make them either more desirable or less desirable as jurors does not require their disqualification.

The systematic exclusion of any class of jurors from the federal grand jury or District Court jury is a violation of due process of law guaranteed by the Fifth Amendment and the Sixth Amendment to the Constitution of the United States.

Brown v. Allen, 344 US 443, 97 L.ed. 469

Avery v. Georgia, 345 US 559, 97 L.ed. 1244

Hernandez v. Texas, 347 US 475, 98 L.ed. 866

Williams v. Georgia, 349 US 375, 99 L.ed. 1161

Reece v. Georgia, 350 US 85, 100 L.ed. 77

Eubanks v. Louisiana, 356 US 584, 2 L.ed.2d 991

Re Jugiro, 140 US 291, 30 L.ed. 510

In Eubanks v. Louisiana, 356 US 584, 2 L.ed.2d 991, the court said:

> "In an unbroken line of cases stretching back almost 80 years this Court has held that a criminal defendant is denied the equal protection of the laws as guaranteed by the Fourteenth Amendment

> if he is indicted by a grand jury or tried by a petit jury from which members of his race have been excluded because of their race."

We think the same rule applies to exclusion of attorneys, because they are attorneys, from service on a grand jury, and a grand jury which excludes attorneys systematically and by rule, violates equal protection of the laws as guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States.

The Supreme Court said:

> "Nor is this court at liberty to grant or withhold the benefit of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty. Hill v. Texas, 316 US 400, 406, 86 L.ed. 1559, 1563."

The exclusion of women lawyers, as a class, from the grand jury equally makes the indictment defective.

> Ballard v. U.S., 329 US 187, 91 L.ed. 181
> Thiel v. So. Pacific Co., 328 US 217, 90 L. ed. 1181, 166 ALR 1412

In Ballard v. U.S., supra, the Supreme Court of the United States said:

> "We are met at the outset with a concession that women were not included in the panel of grand and petit jurors in the Southern District of California where the indictment was returned and the trial had; that they were intentionally and systematically excluded from the panel."

Similarly, in the instant case, we are met at the outset with the concession that lawyers as a class were not included in the grand jury and petit jury in the Southern District of California wherein this indictment was returned, "that they were intentionally and systematically excluded from the panel by an order of court."

In Ballard v. U.S., supra, the Supreme Court, quoting from Thiel v. So. Pacific Co., supra, said:

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn with a cross section of the community ... Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group

or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury. 328 US 217, 90 L.ed. 1181" (329 US 192, 193, 91 L.ed. 185)

X

THE APPELLEE ROOT CAN RAISE THE POINT AND HAVE THE COURT DETERMINE THE INVALIDITY OF THE INDICTMENT ON THE GROUND THAT WOMEN LAWYERS WERE EXCLUDED FROM THE GRAND JURY WHICH RETURNED THE INDICTMENT.

The same argument we have presented for excluding lawyers, as a class, applies equally to excluding women lawyers, as a class.

See:

Ballard v. U.S., 329 US 187, 91 L.ed. 181

XI

THE COURT SHOULD STRIKE THE GOVERNMENT'S BRIEF ON APPEAL FOR NON-COMPLIANCE WITH THE RULES OF THIS COURT FOR FAILURE TO

SET OUT THE PROLIX AND LENGTHY INDICTMENT OF 148 PAGES IN ITS OPENING BRIEF.

Rule 18, Rules of the United States Court of Appeals for the Ninth Circuit, requires that briefs contain:

> "...A statement of the pleadings and the facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction to review the judgment, decree or order...."

The appellant's brief fails to set out Section 3731 of Title 18, U.S. Codes and also fails to set out the Local Rule adopted by the judges in the United States District Court for the Southern District of California, Central Division, excluding lawyers from the grand and petit juries.

We think this, alone, makes the appellant's brief fatally defective and it should either be stricken or referred back for correction.

Appellant's brief also fails to set out the pleadings which are under attack, which are 148 pages long, on long paper, and would run more likely to 200 or more pages on the size paper required by this Court, and would therefore be a violation of this Court's rule regarding a brief of 80 pages in length.

Appellant's brief is also inadequate in presenting the issues to this Court so this Court could, itself, see on its face that the document is not a plain, concise and definite written statement of the essential facts constituting the offenses charged and therefore it is a circuitous route of avoiding what we think the rule requires, namely, to set up for this Court the whole of the indictment so that it can see for itself that it violates the Sixth Amendment to the Constitution of the United States and Rule 7(c), Federal Rules of Criminal Procedure, and is demonstrative evidence of that fact.

We think, in the absence of setting up the indictment totidem verbis, that the brief does not comply with Rule 18, Rules of the United States Court of Appeals for the Ninth Circuit and that the appeal either should be dismissed or the brief sent back to the United States Attorney for further correction and amplification and obtaining of the consent of Court to have a brief of proper length.

Counsel for appellee Root hereby and herewith adopts by reference all the arguments and points made by counsel for appellee George Forde as though fully set forth herein and for the sake of avoiding repetition.

CONCLUSION

WHEREFORE, appellee Root prays that this Honorable Court affirm the order of the District Court dismissing the indictment; or, if the Court does not affirm said order, then

1. That the appeal be dismissed for want of jurisdiction of this Court to hear the same.

2. That the appellant's brief be stricken as not in compliance with the rules, or to give appellant a further opportunity to set forth the indictment and to obtain permission to file a brief exceeding the length permitted by the rules and to fully set forth the statutes on which jurisdiction is claimed and also the Local Rules regarding the composition and selection of grand juries and the exclusion of lawyers from the grand juries.

3. After compliance with the rules, if permission is granted, and if this Court holds that it lacks jurisdiction, then to transfer the case to the United States Supreme Court.

Respectfully submitted,

MORRIS LAVINE
Attorney for Appellee Root

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Morris Lavine
Attorney for Appellee Gladys Towles Root

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Sixth Amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to ... be informed of the nature and cause of the accusation; ..."

Title 18, Section 1503, U.S. Codes:

"Influencing or injurying officer, juror or witness generally.

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States, or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other

committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Title 18, Section 1621, U.S. Codes:

"Perjury generally.

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or

certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States."

Title 18, Section 1622, U.S. Codes:

"Subornation of perjury.

"Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 ir imprisoned not more than five years, or both."

Title 18, Section 3731, U.S. Codes:

"Appeal by United States.

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment

is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

Rule 7(c), Federal Rules of Criminal Procedure:

(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. ..."

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v.. GLADYS TOWLES ROOT, et al., Defendants.	NO. 34,352-CR. MEMORANDUM

The defendants are lawyers who represented Barry W. Keenan, Joseph Clyde Amsler and John William Irwin who were convicted of kidnapping one Frank Sinatra, Jr., in Case No. 33,087-Criminal, in this District and Division.

The trial in that case began February 10, 1964, and concluded on March 7, 1964. It is charged in the Indictment that the defendants herein represented the convicted kidnappers from on or about December 14, 1963 to the conclusion of that trial.

This is the second indictment against the defendants for alleged crimes arising out of, or in connection with, their representation of the defendants in that trial. The first was dismissed by the Court for failure to state an offense.

The present indictment is in five counts covering 148 pages.

The First Count is for conspiracy (1) to defraud the

United States; (2) to corruptly obstruct, et cetera, witnesses, in violation of 18 U.S.C. 1503; (3) to suborn perjury in violation of 18 U.S.C. 1622; (4) to commit perjury in violation of 18 U.S.C. 1621; and (5) to corruptly obstruct, et cetera, justice in violation of 18 U.S.C. 1503, all in said Case No. 33,087-CR. The Second Count is for alleged subornation of perjury of Defendant Joseph Clyde Amsler in said Case No. 33,087-CR., and is in XII paragraphs containing 509 questions and answers, and covers 69 pages; the Third Count is for alleged subornation of perjury of John William Irwin, covering 67 pages in XXI paragraphs with 236 questions and answers;and the Fourth and Fifth Counts charge obstruction of justice by having Joseph Clyde Amsler (Fourth Count) and John William Irwin (Fifth Count) testify falsely in the kidnapping trial, Case No. 33,087-CR.

While the indictment is thus cast in five counts, it is apparent that the gravamen of the offenses charged is that the defendants induced Amsler and Irwin to testify falsely concerning matters which are described only by subject matter in Counts I, IV and V, which false testimony may, or may not, be found scattered somewhere among the 745 questions and answers that are contained in Counts II and III, or somewhere else in the 4500 pages of the Transcript of the evidence of the trial in Case No. 33,087-CR.

Since taking the Motions to Dismiss under submission, the Court has carefully and repeatedly examined the indict-

ment and the authorities cited by the parties, as well as many others, and cannot conscientiously come to a judgment that the defendants are sufficiently informed by the indictment of the charges against them so as to be able to know what they must meet to defend themselves, or, in case any other proceedings are taken against them, arising out of or related to their representation of the defendants in Case No. 33,087-CR., they could plead a former acquittal or conviction. The indictment thus does not state an offense and is ordered dismissed and defendants' bonds exonerated.

It would serve no useful purpose to indulgeiin a prolonged dissertation of my views. It is sufficient to say that the Motions are granted on the grounds and for the reasons set forth in the Motion of Defendant Forde, and on the authorities cited by both defense counsel in their supporting briefs, and, as to the conspiracy count, on Pettibone v. U.S., (1893) 148 U.S. 197, cited by the United States.

The Court specifically rejects grounds numbered 2, 3, 4 and 5 in the Motion of defendant Root to quash, filed on January 12, 1965, and in the Supplemental Motion to Dismiss filed on behalf of defendant Root on January 18, 1965.

Dated: Los Angeles, California, June 28, 1965.

/s/ Peirson M. Hall
United States District Judge

APPENDIX B